IN THE

Supreme Court of the United States

WILLIAM LUCKING,
Petitioner,
vs.
DETROIT & CLEVELAND NAVIGATION COMPANY,
Respondent.

No. ~~826~~ 212

PETITION FOR CERTIORARI

BRIEF FOR RESPONDENT

HENRY I. ARMSTRONG, Jr.,
Attorney for Respondent.

ALEXIS C. ANGELL,
JAMES TURNER,
CLIFTON G. DYER,
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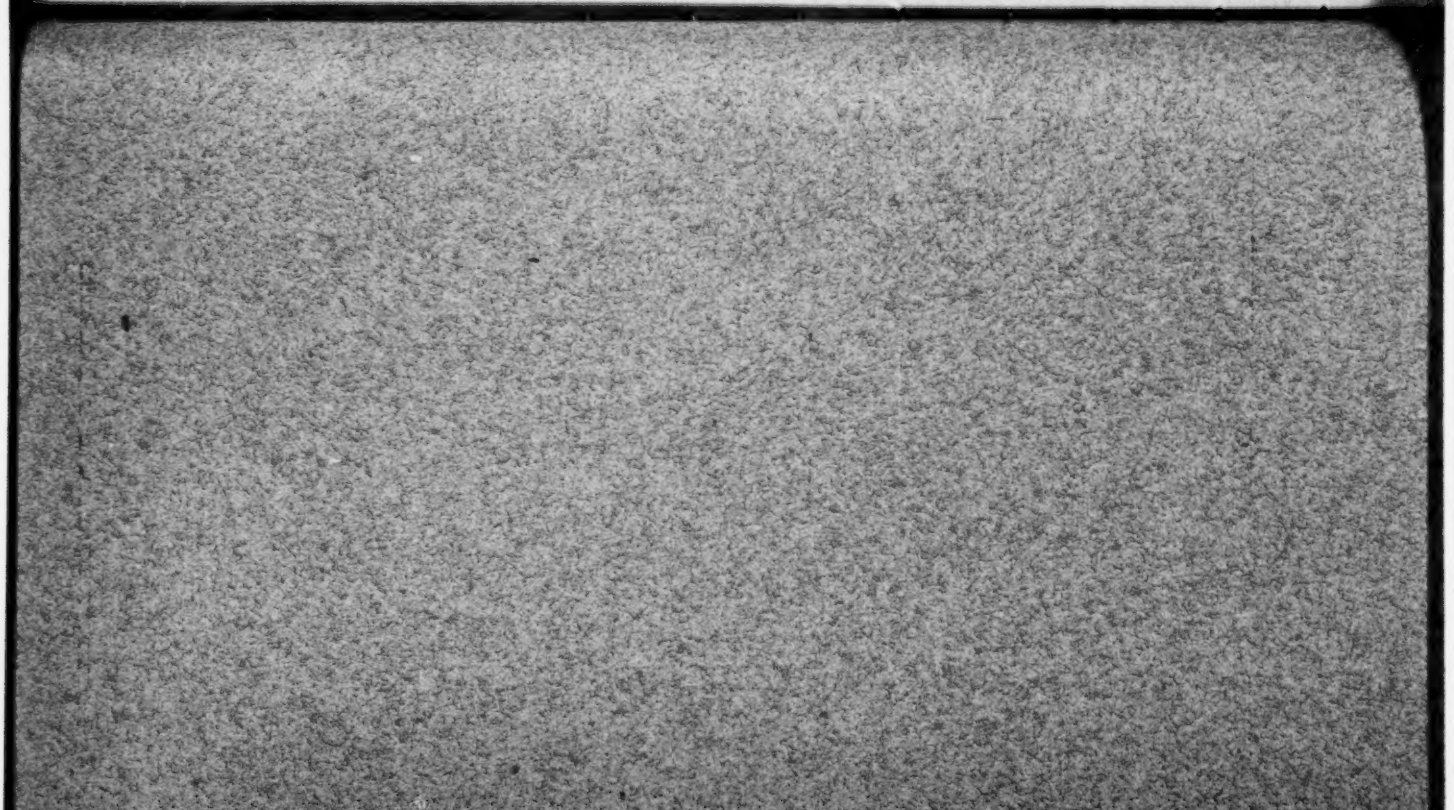
COMMERCE PRESS COMPANY
DETROIT, MICH.



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STATEMENT OF THE CASE

This is a petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit.

The petitioner here filed a bill in equity in the District Court of the United States for the Eastern District of Michigan, Southern Division, March 25th, 1921. In April, 1921, the defendant filed an answer to the bill, under oath, and joined with the answer a motion to dismiss the bill. The motion was heard and the Court, on May 20th, filed an opinion (273 Fed. 577) and entered

an order dismissing the bill. A petition for rehearing was filed May 31st, and the motion was denied on June 8th. On August 2nd a motion for leave to amend the bill was filed, which was denied on the same day. An appeal was taken by the plaintiff to the Circuit Court of Appeals. This was argued on March 10th, 1922, and on November 7th, 1922, the order of the District Court dismissing the bill was affirmed (284 Fed. 497).

In January, petitioner filed an appeal to this Court from the decree of the Circuit Court of Appeals, which appeal has been allowed. (See Petition herein, page 7).

The respondent is a corporation organized under the Commerce and Navigation law of Michigan. It owned, when the bill was filed, several steam vessels. It had been in the habit of running two of them between Detroit and Mackinac and St. Ignace, at the upper end of Lake Huron, over a route called the Mackinac Route. It had been in the habit of running two of them between Detroit and Cleveland, Ohio, on what is known as the Cleveland Route; and two of them between Detroit and Buffalo, New York, on what is known as the Buffalo Route.

Early in the year 1921, the plaintiff got the impression that respondent did not propose to operate any steamers on the Mackinac Route in the approaching navigation season of 1921. He filed a bill to compel the respondent to fit out two of its steamers and operate them on the Mackinac Route during the season.

There is no averment in the bill that even if this service were discontinued, plaintiff would not have public service by water or by rail and water between Detroit and Mackinac (284 Fed. 499).

The question involved was whether any duty, arising either from the common law or from statute, State or Federal, rested upon the respondent to furnish the service desired by the plaintiff, if its derectors deemed it unwise to operate its steamers on that route during that season.

An examination of the bill will show that some of the matters set forth in the brief under the caption "The Facts" are merely averments in the bill made on information and belief, such as are contained on page 4 of the breif, that respondent has made large profits on its capital invested in this so-called Mackinac Route, and that in 1919 its profits on its business equalled 25% and that it has made large net profits in its business in the past; that many of the cities along Lake Huron were developed and built up in part by the transportation service of the defendant. (See brief page 5).

In view of what has just been stated, we call the Court's attention to the statement that "by the motion to dismiss, the respondent admitted that the service over the route is necessary to the public, and that it performs this service at a profit".

The answer shows what the facts have been, but apart from it the matters above spoken of are averred upon information and belief. The theory upon which petitioner proceeds is wrong in this respect, even if the matters spoken of had any important bearing upon the ultimate question involved.

ARGUMENT.

If the respondent was under any duty to operate the Mackinac Route in 1921, when its directors thought it unwise so to operate it, it must have been because either the common law or some statute imposed the duty.

Our contention is and has been that such duty was not and is not imposed upon it.

I

NO COMMON LAW DUTY EXISTS TO OPERATE THE ROUTE.

No case can be found where such a common law duty as is here contended for has been held to exist. The individual owner who operates his vessel in maritime commerce may become a common carrier of both freight and passengers; so may a partnership; so may a corporation. The individual, the partnership and the corporation may navigate with vessels the public waters, one as freely as the other. In the earlier years of the history of this State, it was not uncommon for a man or for a partnership to own vessels which for a considerable time were run on a particular route, and for him or them to become a common carrier on that route.

See

Wright vs. Caldwell, 3 Mich. 51.
McKee vs. Owen, 15 Mich. 115.
Laffrey vs. Grummond, 74 Mich. 186.

Had such an individual ceased to operate a line which he had formerly operated between ports on the Great Lakes, he could not have been compelled, against his will, to continue to operate the line.

Judge Tuttle, in the District Court for this District, said, correctly:

"It has never been supposed and could not be seriously contended that every person who engages in the business of transportation, as a common carrier, is obliged to continue such business indefinitely, and may be restrained by injunction from abandoning such routes as he may wish to discontinue". (Rec. p. 21).

Judge Knappen, for the Circuit Court of Appeals, remarks:

"In our opinion such suspension or discontinuation of service upon one or more, or all, of the routes theretofore navigated is not forbidden by the common law under circumstances such as exist here. None of the numerous decisions which assert the power of the courts to prevent suspension or discontinuance by a railway company of its rail lines, in whole or in part, have, so far as we are advised had any relation to navigation companies. So far as decisions denying the right of a railroad company to abandon its lines or tracks may be thought to rest upon common law principles, unaided by statute, an exception, upon principle, of navigation companies such as defendant may well be found in the absence of contract, express or implied, for operating upon a given route, in connection with the lack of privileges such as eminent domain, as applied either to lines of travel (unnecessary upon the open seats) or to the acquisition of dock and wharf facilities, as well as with the common practice of navigation companies to go out of business altogether or to change routes and service from time to time, as the interests of the navigation company may dictate. But whatever may be the reason, the fact

> that the existence of the common law power asserted by plaintiff has not heretofore been judicially declared is highly significant."

So long as the respondent continues to operate a line, it is, it is true, obliged to furnish on such line reasonable service in transportation for passengers and freight. No question is involved here of the reasonableness of the service on any route which was operated by respondent when this suit was instituted. The duty of reasonable service upon operated lines is not a duty to continue service upon a line which respondent has ceased to operate.

The fact that respondent is a corporation does not impose upon it a duty to maintain its service, if it wishes to discontinue it. In this regard it is in no different position from an individual carrier.

It is not obliged at common law to maintain service on the Mackinac route under the circumstances existing here.

II.

NO DUTY IS IMPOSED ON THE RESPONDENT TO MAINTAIN SERVICE ON THE ROUTE BY THE STATUTE UNDER WHICH IT IS ORGANIZED.

The respondent's Articles of Association are as follows:

> "Article I: This corporation is formed for the purpose of engaging in the business of maritime commerce and navigation in this State or upon the frontier lakes or other navigable waters, natural or artificial connecting therewith, and for acquiring, owning, holding or disposing of every kind of personal property or estate whatsoever

which may be necessary to enable this corporation to carry on the operations and business mentioned herein."

Respondent is organized under the Act of 1867, commonly called the Commerce and Navigation Act, being Chapter 181 of the Compiled Laws of 1897, Volume 2, page 2154, entitled, "An Act to authorize the formation of corporations for the purpose of engaging in commerce and navigation." The Act provides that by compliance with its provisions persons may become a body corporate "for the purpose of engaging in the business of maritime commerce or navigation within this State or upon the frontier lakes or other navigable waters, natural or artificial, connecting therewith."

This statute was superseded by the general incorporation Act of Michigan of 1903, Act 232, Public Acts of 1903, Compiled Laws 1915, Chapter 175.

Under the Act of 1867 and under that of 1903, a vessel company is given no right to navigate any particular waters of the Great Lakes, and no duty is imposed upon it to navigate any such waters. Those associating are become a body corporate, but the Act in no manner attempts to direct how or where the corporation shall conduct its business of maritime commerce.

It will have been observed that the defendant's Articles, which constitute its charter, contain no designation or mention of the route over which navigation was to be carried on. Nor did the statute require any such designation. The corporation is given no powers except the power to be a corporation which an individual vessel owner or partnership vessel owner does not have. The

corporation may do nothing more in the way of conducting its business than an individual or partnership owner may do in operating a vessel.

The vessel company gets no more privileges from the State than does the manufacturing company; indeed, as has been said, for many years now vessel companies have been organized under the general Act which covers manufacturing companies. A vessel corporation is given no power of eminent domain; no power to build or remove bridges—no such powers, in short, as are conferred by law upon a corporation, which is organized to operate a steam railway or a street railway, or a telephone or telegraph line. No duty is imposed upon a vessel corporation to fix or maintain any particular route, as is the case with a railroad company.

As Judge Tuttle has said, "a vessel corporation has no private right of way or special facilities for acquiring a means of access by its vessels to docks or wharves; it must use the open sea as its highway, and depend for the proper maintenance of its vessels and equipment upon such arrangements as it may be able to make upon a private contract, like any other private citizen. In the eyes of the law it occupies no different position than that of a common carrier operating taxicabs or other vehicles upon land, nor is it under any greater obligation than is the common carrier just mentioned so far as continuous operation of its lines is concerned."

No duty rests upon the respondent to maintain the service in question so far as the statute under which it is organized is concerned.

III.

NO OTHER STATUTE OF MICHIGAN IMPOSES THE DUTY ALLEGED.

In the brief in support of the petition, it is not distinctly insisted in this Court that any other Michigan statute imposes the duty. There is an allusion on page 23 of the brief to the so-called tonnage tax Act of the State. The opinion in the Court below deals fully enough with such Michigan statutes including the tonnage tax act, as were discussed in that Court (284 Fed., 501, 502).

The point needs no further consideration.

IV.

THE FEDERAL STATUTES IMPOSE NO SUCH DUTY AS ALLEGED.

It is not claimed in the brief that this duty is imposed by the Shipping Board Act.

It is urged that the Interstate Commerce Act imposes the duty. Section (1), subdivision (a), Section (3), Section (4) are quoted and relied upon.

By the first sub-section Congress has, to some extent, exercised control over freight and passenger service, moving partly by rail and partly by water under joint lake and rail rates.

In sub-section (3) it has defined the word "transportation" to include vessels, and in sub-section (4) it has laid the duty upon the carrier to furnish transportation upon reasonable request therefor.

The fact that these sections appear in the Act, however, plainly does not forbid respondent to discontinue service upon and wholly to abandon its Mackinac route.

The main control of water carriers is not in the Interstate Commission, whose control is principally as to the matter of compelling the making of reports to the Commission, and as to the matter of joint lake and rail rates under joint tariffs.

Since 1920 the Interstate Commerce Commission Act has forbidden a carrier by rail to abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that public convenience or necessity permits such abandonment.

Interstate Commerce Act, as amended February 28th, 1920, Section 1, sub-section (18).

No provision of any kind is found anywhere in the Act applicable to a carrier by water which may desire to discontinue its service on a route, or portions of a route. Congress has thus recently legislated upon the subject of abandoning existing lines of transportation. It has expressly imposed the limitation which it has created, not upon "every common carrier subject to this Act," as in certain other clauses of the statute, but upon "the carrier by railroad subject to this Act." The intent plainly was to exclude from the burden so imposed every other common carrier. The very expression of Congress excludes vessel companies, like the defendant, from the restriction which it is claimed binds it in this case, while that expression includes railroads.

In the face of this language in the very Act under consideration, it cannot, we submit, properly be argued that the Interstate Commerce Act forbids respondent's discontinuance of its service on the Mackinac route.

We quote the apposite language of the Court below, referring to the subdivisions of the Act relied on by petitioners:

> "Not only do we find in these provisions of the Interstate Commerce Act no inhibition upon a carrier by water to suspend or discontinue its route or routes, in whole or in part (defendant is not a carrier by rail, except in the sense that it carries by water under joint tariffs, rates and arrangements with rail carriers), but any implication of such inhibition is to our minds plainly repelled by sub-section 18 of the amended Act, which provides" etc.

V.

THE POINTS MADE BY THE PETITIONER IN HIS BRIEF DO NOT LEAD TO THE CONCLUSION HE URGES.

Unless the respondent is compelled by law to continue indefinitely the Mackinac route, it is guilty of a breach of no duty if it discontinues operating it. If it is under any duty, it must be because the duty is imposed upon it by some statute or by common law principle, but, as we have seen, neither the common law nor the statute impose any such duty.

This furnishes a complete answer to the rather elaborate argument of the petitioner. Brief comment, therefore, is only necessary upon some of the points made by him.

1. Petitioner's point 3 is that the respondent is specifically within the terms of the Interstate Commerce Act. This point is based upon *Interstate Commerce Commission vs. Goodrich Transit Company,* 224 U. S. 194.

In that case the Commissioner had ordered the use of a certain method of bookkeeping and of reports to include intrastate as well as interstate business. The water carriers involved did some business which, under joint tariffs and joint rates with railroads, was carried partly by rail and partly by water. The question was whether the Commission had power to make the order as to bookkeeping and reports.

The Court held that the Commission had such power. That is all that was involved in the case.

Water carriers which operate under joint tariffs with railroad companies for interstate transportation are obliged, conformably with that case, to file their tariffs and their accounts with the Interstate Commission. As regards that matter, the water carriers are of course specifically within the terms of the Act, where they carry, under point tariffs evidencing the common arrangement, goods shipped partly by rail and partly by water.

No such question is raised here as was raised in the Goodrich case. That decision does not hold that there is anything in the Interstate Commerce Act which forbids respondent to discontinue its service on the Mackinac route.

The other cases cited by petitioner in this general connection have no bearing upon the point here involved, and need no discussion.

2. Under point 4, petitioner urges that the respondent is within the terms of the Interstate Commerce Act, because of the language from that Act which he quotes. This point we have already above considered.

3. Under point 5, petitioner states that common carriers are often compelled to operate branch lines where public necessity therefor appears. In support of this point he cites a good many railroad cases, but no cases such as this. He lays special stress upon the case of *Chesepeake & Ohio Railroad Co. vs. Commission,* 242 U. S. 603. A State Railroad Commission required a railroad company to furnish passenger service on a branch which had before been used only for transporting freight. The State Court affirmed an order of the Commission and held that the branch line was an integral part of the railway system, and was therefore devoted to the transportation of passengers as well as of freight. This Court affirmed on the ground that it had always been a statutory duty to transport persons over the branch line.

The case was decided, not because of any provision in the Interstate Commerce Act, but because under the State statutes a duty to carry passengers was held to rest upon the railroad company.

The case is not an authority for holding that in this case any statute at all compelled the respondent, on the facts involved here, to furnish the service sought between Detroit and Mackinac.

Allusion is also made to *Gasser vs. Railroad,* 205 Mich., 5. In this case a railroad company sought to abandon its entire line, and thus deprive a village and the surrounding country of any connection with any railroad whatever. The case adds nothing to the rules with reference to railroad companies embodied in the statutes of Michigan. It has no bearing upon the case of a Michigan vessel company ceasing to operate a particular route. Here the railroad company, by its articles, had fixed a particular route, and its only route, and entered upon its duties. It was held that without the consent of the State it could not thus discontinue the performance of the duty which it had under the Railroad Act assumed.

An examination of the cases cited by petitioner will show that they are all cases turning upon the rights and duties of railroad companies under the statutes of different States. None of them is such case as is here involved, of a corporation organized under an Act like the Michigan Commerce and Navigation Act, with Articles of Association such as those of respondent. Nor is the plaintiff without public service by water or by rail and water between Detroit and Mackinac (284 Fed. 479).

Unlike the case of a railroad company, the Articles of Association contain no designation of a route or routes over which the steamers of the Company were to be operated, and the statute itself required no such designation.

The distinction between the case of the railroad carrier and the water carrier in this respect is vital. The authorities cited in the point under discussion do not bear upon this case.

4. The point that the fact that the respondent has no power of eminent domain does not relieve it from the duty here alleged, is based upon the case of the *Central Transportation Company vs. Pullmans Car Co.*, 139 U. S., 24.

In that case the plaintiff, though a manufacturing company, was incorporated for the transportation of passengers in railroad cars constructed and to be owned by it. It had leased all its cars and patents to defendant for 99 years, and covenanted not to engage in the business of manufacturing, using or hiring cars while the contract was in effect. It had thus disabled itself from performing any duty to anyone with its property. After the termination of this lease, it sued the defendant on the lease to recover rental payments. The Court held that the lease was *ultra vires* and that no recovery could be had.

This Court said that plaintiff was charged with the duty of accommodating the public in the line of its employment, independently of its possessing any right of eminent domain.

The present case is obviously totally unlike the Central Transportation Company. Here there is no question of *ultra vires*. The defendant under the Act of 1867 is under no duty to carry passengers at all. Its discontinuance of the Mackinac Division does not disable it to transport passengers and freight upon the Great Lakes, or even to operate the Mackinac Division again if circumstances should warrant.

There is nothing in the Central Transportation case to indicate that under the Interstate Commerce Act or the common law a vessel company is bound forever to

operate one of its lines which it has found desirable to discontinue. It has no relation whatever to navigation companies. The Central Transportation Company was, under its charter, conducting a business "affected with a public interest," notwithstanding it possessed no power of eminent domain. This fact was held to render impossible recovery on a contract which totally disabled it from carrying out the business for which it was chartered. No such case is here presented, and the decision under discussion does not lead to the conclusion that the respondent was guilty of any breach of duty in discontinuing the Mackinac route.

5. In the portion of his brief headed "Conclusion," counsel states that the District Court held that such provisions as are contained in the Interstate Commerce Act and Michigan statutes are "merely declaratory of the common law." In this, we submit, counsel has fallen into error.

Judge Tuttle, in speaking of the fourth subdivision of the first section of the Interstate Commerce Act

> "It shall be the duty of every common carrier subject to this Act, engaged in the transportation of passengers and property, to provide such transportation upon reasonable request therefor"

remarked that this duty was merely declaratory of the common law rule covering the duty of common carriers. (Tr. in Court of Appeals, page 21).

The Court of Appeals states in its opinion that it agrees with the District Court in this respect (284 Fed. 502).

Neither of the courts below held as broadly as the statement of counsel appears to intimate that they did.

It seems unnecessary to comment further upon the other remarks in the last division of petitioner's brief.

VI.

As has been pointed out above, the petitioner has already perfected an appeal from the decree in the court below. It is submitted:

(1) That if an appeal is the proper remedy, this petition should be denied; and

(2) That if certiorari is the proper remedy, there is no merit in the contention of petitioner, and that in any event a writ should not issue.

Henry I. Armstrong, Jr.,
Attorney for Respondent.

Alexis C. Angell,
James Turner,
Clifton G. Dyer,
James B. Angell,
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1922

No. 212

WILLIAM LUCKING,
Plaintiff and Appellant,
vs.
DETROIT & CLEVELAND NAVIGATION COMPANY,
Defendant and Appellee.

NOTICE AND MOTION

ANDREW B. DOUGHERTY,
Attorney General of the State of Michigan.
Business Address, Capitol, Lansing, Michigan.

FORT WAYNE PRINTING CO., LANSING, MICH.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1922

No. 826

WILLIAM LUCKING,
Plaintiff and Appellant,
vs.
DETROIT & CLEVELAND NAVIGATION COMPANY,
Defendant and Appellee.

NOTICE OF MOTION

Please take notice that at the opening of the session of the Supreme Court of the United States on Monday, the 25th day of February, 1924, or as soon thereafter as counsel can be heard, the undersigned will submit the annexed motion for leave to file a brief on behalf of the State of Michigan as amici curiae.

Andrew B. Dougherty

Attorney General of the State of Michigan.

Dated, Lansing, Michigan, this 13 day of February, 1924.

To Alexis C. Angell,
Attorney for Defendant and Appellee.

Therefore, leave is prayed to file a brief on behalf of the People of the State of Michigan as amici curiae.

Respectfully submitted,

Andrew B. Dougherty

Attorney General of the State of Michigan.

Dated, Lansing, Michigan, this ....13..... day of February, 1924.

In the

SUPREME COURT OF THE UNITED STATES

October Term 1923.

No. 212

WILLIAM LUCKING,
Plaintiff and Appellant,
vs.
DETROIT & CLEVELAND
NAVIGATION COMPANY,
Defendant and Appellee.

OBJECTION TO MOTION OF STATE OF MICHIGAN

ALEXIS C. ANGELL,
Attorney for Defendant and Appellee.

JUDICIAL PRINT COMPANY
DETROIT, MICH.

In the

SUPREME COURT OF THE UNITED STATES

October Term 1923.

No. 212.

WILLIAM LUCKING,
Plaintiff and Appellant,
vs.
DETROIT & CLEVELAND
NAVIGATION COMPANY,
Defendant and Appellee.

OBJECTION TO MOTION OF STATE OF MICHIGAN.

On February 14th copy of motion for leave to file a brief on behalf of the State of Michigan as "Amici Curiae" was received.

It is respectfully submitted that, in fairness to the appellee, at this late date this motion ought not to be granted.

The case is now within a few days, as we understand, of being reached for argument.

The City of Alpena and the City of Cheboygan filed briefs in the Circuit Court of Appeals (Appellant's brief, page 31). They have not even sought to file briefs in this court.

At the first hearing in the District Court in the spring of 1921, a representative of the Attorney General was present. From that time until the receipt of this motion, the Attorney General's office has taken no step in the case.

From the opinion of the Court of Appeals (Tr. pp. 24, 25) it appears that in 1921 the State of Michigan passed an Act giving the Michigan Public Utilities Commission jurisdiction to regulate rates, fares and service of any carrier by water within the State. The plaintiff filed a complaint under this Act with said Commission, under which some testimony has been taken. All of these things appear by the record, appellant's brief and the affidavit filed herewith.

Even if the State of Michigan had any interest in this case when it was begun, since the Act of 1921, such interest, we submit, has disappeared. The litigation now properly can be of interest only to the parties, but not to the State.

If the Court should see fit to grant to the Attorney General the privilege of filing a brief, as he asks, it is respectfully submitted that the argument of the cause should not be delayed. If this brief should bring up new questions which have not been argued and considered hitherto, there will be little or no time in which the appellee may file a considered brief in reply.

The brief for the appellee has been on file in this cause about four months and that in behalf of the appellant about two months. Why this sudden interest in the case at this late hour on the part of the Attorney General?

It is respectfully submitted that it would be unfair to the appellee to permit, under the circumstances, a brief to be filed by the State of Michigan at this time, when the result would be either to postpone the submission of the cause or to preclude the appellee from having a fair opportunity to consider maturely and reply to such brief.

Alexis C. Angell

Attorney for Defendant and Appellee.

In the

SUPREME COURT OF THE UNITED STATES

October Term 1923.

No. 212.

WILLIAM LUCKING,
Plaintiff and Appellant,
vs.
DETROIT & CLEVELAND NAVIGATION COMPANY,
Defendant and Appellee.

State of Michigan, County of Wayne, ss.

James Turner, being duly sworn, deposes and says that he resides in the City of Detroit, in said County, and is a member of the firm of Angell, Turner & Dyer, and is acquainted with the facts hereinafter stated.

That at the first hearing of the District Court of the United States for the Eastern District of Michigan, Southern Division, in Equity, in the spring of 1921, he was personally present, and that a representative of the Attorney General of the State of Michigan was present during the argument, and that from that time until the recent receipt of this motion, the Attorney General's office has taken no step in the case; that in the summer of 1921 the plaintiff filed a complaint with

the Michigan Public Utilities Commission under the statute of Michigan adopted in 1921, and that the Commission proceeded, in the summer of that year, to take some testimony under the complaint.

James Turner

Subscribed and sworn to before me this

19th day of February, A. D. 1924.

Minnie E. Van Deusen

Notary Public, Wayne County, Michigan.

(Seal) My commission expires

June 4 1927